Dirga Niaga (Selangor) Sdn Bhd (in liquidation, Augustine a/l TK James as liquidator) & Ors v Lim Chien Lang (as administrator for the estate of Yap Yew Chong, deceased) & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCVC)(W)-1972–09 OF 2018 AND W-02(NCVC)(W)-1973–09 OF 2018
MARY LIM, HAS ZANAH AND VAZEER ALAM JJCA
16 JUNE 2020

Civil Procedure — Appeal — Finding of fact by trial judge — Interference by appellate court — Whether trial judge erred in finding in favour of plaintiffs against defendants — Whether trial judge right to find testimony of second and third defendants that they had no records on plaintiffs' ownership of the settlement units as incredible — Whether trial judge erred in ordering first to fourth defendants to jointly and severally pay plaintiffs damages in lieu of specific performance — Aggravated damages — Whether there was evidence of aggravation suffered by plaintiffs — Whether facts of case bring it within any one of accepted categories set out for award of exemplary damages — Whether trial judge erred in awarding plaintiffs aggravated damages of RM50,000

Companies and Corporations — Winding up — Liquidators — Breach of duty — Whether second and third defendants acted as liquidators of Dirga in clear contravention of court order — Whether second and third defendants were estopped from arguing that they had no knowledge of plaintiffs' ownership of the settlement units — Whether second and third defendants had deliberately failed to establish Committee of Inspection — Whether second and third defendants deprived creditors and plaintiffs of having a say in the liquidation of Dirga — Whether conduct of second and third defendants did not meet the standards of professional conduct expected of them as officers of the court — Whether second defendant was acting outside his scope of jurisdiction in applying for the vesting order

The judgment involves two suits filed against the same six defendants by different parties as plaintiffs. As the High Court judge delivered a single judgment for both suits, both appeals were heard together. The plaintiffs in both suits were subcontractors appointed by WCT Engineering Bhd (WCT) to perform certain subcontract works for a construction project awarded to WCT as a main contractor by Europlus Corp Sdn Bhd (Europlus) and Maxisegar group of companies as main contractor for a construction project. When Europlus faced financial difficulties, it offered WCT the option of

accepting payment in kind for work done, in the form of transfer and/or assignment of commercial properties located in a development known as Pandan Safari Parade. WCT had accepted that offer of settlement by contra of properties. WCT in turn made a similar offer to the plaintiffs, which they also accepted. The plaintiffs then entered into separate settlement agreements with Europlus and WCT, wherein the plaintiffs accepted properties in Pandan Safari Parade (the settlement units) to set off (contra) payment of the debt due to them from WCT. As the settlement units belonged to Dirga Niaga (Selangor) Sdn Bhd (Dirga), at the material time, the plaintiffs also simultaneously entered into three separate sale and purchase agreements and deeds of mutual covenants with Dirga. The respective sale and purchase agreements provided for Dirga to deliver vacant possession of these settlement units to the respective plaintiffs free from encumbrances. Dirga was subsequently wound up and Augustine James (the second defendant) was appointed by the court as the liquidator of Dirga in place of the official receiver. The second defendant's appointment as liquidator was supported by the plaintiffs. The second defendant appointed one Yoganathan Kanapathipillay (the third defendant) as his authorised representative to carry out the liquidation of Dirga, through the medium of Radiant Consulting Asia Sdn Bhd (the fourth defendant), a company in which the second and third defendants were co-directors. Sometime in 2014, the plaintiffs discovered that their settlement units had been sold off. The plaintiffs thus procured leave from the winding up court to commence the two civil suits against the defendants for recovery and return of their respective settlement units under the settlement agreements or damages in lieu thereof. During the trial the plaintiffs discovered that the purchaser of their respective settlement units was in the process of selling the units. The plaintiffs chose not to contest that sale nor seek the court's intervention to stop it, but instead sought damages for negligence and/or conspiracy by the defendants in wrongfully disposing or selling the settlement units. Based on the evidence, the trial judge found that the plaintiffs were the beneficial owners of the settlement. The High Court thus found in favour of the plaintiffs against the first to fourth defendants in both suits. The first to fourth defendants were ordered to jointly and severally pay the plaintiffs damages in lieu of specific performance and aggravated damages in the sum of RM50,000. This was the defendants' appeal against that decision on the grounds that the trial judge had, inter alia, failed to properly consider that the liquidator had little or no knowledge of the plaintiffs' settlement units; that the settlement agreements were invalid because they were entered into by fraud perpetrated on Dirga; and that the trial judge had wrongly assessed the evidence before him.

Held, allowing the appeal in part with costs of RM50,000 to the plaintiffs:

(1) Although the second defendant denied knowledge of the plaintiffs' beneficial ownership of the settlement units, the evidence showed otherwise. The second defendant sought to replace the official receiver as

A the liquidator of the first defendant, and the plaintiffs, upon the request of the second defendant had supported that application before the winding up court. Hence, the second defendant would have known of the plaintiffs' interest in the winding up of Dirga. Without knowledge of the winding up petition it is inexplicable as to how the second defendant B would have approached the plaintiffs, and other creditors, to support his application for appointment as liquidator of Dirga. In the circumstances, the trial judge was right to find the testimony of the second and third defendants that they had no records on the cause of the winding up nor the plaintiffs' ownership of the settlement units as incredible (see C paras 19–22).

(2) When the second defendant took over as the liquidator of Dirga, there was an appeal pending in the Court of Appeal against the judgment obtained in respect of the settlement agreement the plaintiffs had entered into to secure the settlement units. The second defendant had withdrawn D that appeal. If the second defendant thought that the settlement agreement was invalid or that it was a fraud perpetrated on Dirga, then he ought to have proceeded with the appeal instead of withdrawing it. In any case Dirga had not at any point challenged or disputed the plaintiffs' ownership of the settlement units. As such, the trial judge was correct to E reject the second defendant's challenge by invoking the doctrine of res judicata. In addition, the third defendant had instructed his solicitors to issue a notice of demand to the plaintiffs in one of the civil suits claiming outstanding maintenance charges on the basis that the plaintiffs were the beneficial owner of two of the settlement units. Hence, the defendants F had acknowledged the validity of the settlement agreements and the plaintiffs' beneficial ownership of at least two of the settlement units. Thus, they are now estopped from arguing the contrary. The doctrine of issue estoppel will bar them from doing so (see paras 25–27).

G (3) There is no evidence showing that the officers of Dirga had submitted the statement of affairs to the official receiver or the second defendant. The statement of affairs would have shown who the creditors of Dirga were, and the plaintiffs' beneficial ownership of the settlement units. Further, upon receipt of the statement of affairs, s 235 of the Companies Act 1965 H imposes a mandatory duty on the second defendant as liquidator of Dirga to submit a preliminary report to the winding up court. Moreover, the court order appointing the second defendant as the liquidator of Dirga had also directed him carry out his function as liquidator together with a Committee of Inspection. However, no Committee of Inspection was I formed by the second defendant, whose duty it would have been to call for the meeting of creditors and contributories for the formation of the same. Hence, the second and third defendants had acted as liquidators of

Dirga in clear contravention of the court order, which directed them to act together with a Committee of Inspection. In the circumstances, the trial judge had made the correct determination that defendants had deliberately failed to establish the Committee of Inspection, thus depriving the creditors, including the plaintiffs, a say in the manner in which the liquidation of Dirga was carried out. Based on the evidence, there was nothing amiss in the trial judge's findings that the conduct of the second and third defendants did not meet the standards of professional conduct expected of them as officers of the court (see paras 29, 32–33 & 36–37).

(4) Some four years after his appointment as liquidator, the second defendant had obtained a vesting order pursuant to s 233 of the Act to take into custody and control all the unclaimed units in Pandan Safari Parade and sell them, which included the plaintiffs' settlement units. However, the trial judge was right in finding the vesting order to be a nullity and not binding on the plaintiffs, as they were not parties before the court when the vesting order was made. This is because the second defendant in applying for the vesting order was clearly acting outside his scope of jurisdiction and power under the instrument of his appointment, the court order. Before the second defendant applied for and obtained the vesting order, he should have convened the meeting of creditors and contributories for the purposes of forming the Committee of Inspection, which was a condition mandated by the court order. Under s 236(1) of the Act a liquidator can exercise his powers only with the authority of the court or of the Committee of Inspection. In that respect the liquidator would have had to have regard to the wishes and directions of the Committee of Inspection as required under s 237 of the Act. However, the second defendant failed to do so. Thus, the trial judge was well placed to rule that the vesting order was a nullity. In any case, the non-setting aside of the vesting order, does not affect the finding of liability with regards to neglect of breach of duty (see paras 38–41, 45–46 & 51).

(5) The amount of damages awarded by the High Court was exactly the amount received by the second defendant from the sale of the settlement units. The measure of damages was thus in accordance with established principles, ie fair compensation for the loss of value of the properties. Hence the trial judge was right in holding that the sale price was indicative of the actual loss suffered by the plaintiffs. Although the High Court found that the facts of the case warranted the award of aggravated and exemplary damages, there was no basis for this. There was no evidence of aggravation suffered by the plaintiffs and the facts of the case do not bring it within any one of the accepted categories set out in *Rookes v Barnard* [1964] 1 All ER 367 for the award of exemplary damages (see

A paras 50 & 52).

[Bahasa Malaysia summary

Penghakiman melibatkan dua saman yang difailkan terhadap enam defendan sama oleh pihak-pihak berbeza sebagai plaintif. Oleh kerana hakim Mahkamah B Tinggi menyampaikan satu penghakiman untuk kedua-dua saman, kedua-dua rayuan telah didengar bersama. Plaintif-plaintif dalam kedua-dua saman ialah subkontraktor yang dilantik oleh WCT Engineering Bhg ('WCT') untuk melaksanakan kerja subkontrak tertentu bagi projek pembinaan yang diawardkan kepada WCT sebagai kontraktor utama oleh Europlus Corp Sdn C Bhd (Europlus) dan kumpulan syarikat Maxisegar sebagai kontraktor utama untuk projek pembinaan. Apabila Europlus mengalami masalah kewangan, ia telah menawarkan WCT pilihan untuk menerima bayaran dalam bentuk kerja yang dilaksanakan, dalam bentuk pemindahan dan/atau penyerahan harta komersial yang terletak dalam pembangunaan yang dikenali sebagai Pandan D Safari Parade WCT telah menerima tawaran penyelesaian tersebut dengan kontra harta tanah. WCT sebaliknya telah membuat tawaran yang sama kepada plaintif-plaintif, yang juga telah menerimanya. Plaintif-plaintif kemudian telah memasuki perjanjian penyelesaian berasingan dengan Europlus dan WCT, di mana plaintif-plaintif menerima hartanah di Pandan E Safari Parade ('unit-unit penyelesaian') untuk bayaran penepian (kontra) hutang kena dibayar kepada mereka daripada WCT. Oleh kerana unit-unit penyelesaian itu dimiliki oleh Dirga Niaga (Selangor) Sdn Bhd (Dirga), pada masa matan, plaintif-plaintif juga serentak telah memasuki tiga perjanjian jual bei dan ikatan perjanjian bersama dengan dirga. Perjanjian jual beli F masing-masingnya memperuntukkan agar Dirga menyerahkan milikan kosong unit-unit penyelesaian kepada plainitf-plaintif masing-masingnya bebas daripada sekatan. Dirga kemudian telah digulungkan dan Augustine James (defendan kedua) telah dilantik oleh mahkamah sebagai penyelesai Dirga menggantikan pegawai penerima. Lantikan defendan kedua sebagai G penyelesai disokong oleh plaintif-plaintif, defendan kedua telah melantik Yoganathan Kanapathipillay (defendan ketiga) sebagai wakil yang diberi kuasa untuk menjalankan penyelesaian Dirga, melalui perantara Radiant Consulting Asia Sdn Bhd (defendan keempat), syarikat yang mana defendan-defendan kedua dan ketiga adalah pengarah bersama. Sekitar 2014, plaintif-plaintif H mendapati bahawa unit-unit penyelesaian mereka telahpun dijual. Plaintif-plaintif dengan itu telah memperoleh kebenaran dari mahkamah penggulungan untuk memulakan dua saman sivil terhadap defendan-defendan untuk mendapat balik dan pengembalikan unit-unit penyelesaian mereka masing-masingnya di bawah perjanjian penyelesaian itu I atau ganti rugi menggantikannya. Sepanjang perbicaraan plaintif-plaintif mendapati bahawa pembeli unit-unit penyelesaian mereka masing-masingnya dalam proses menjual unit-unit tersebut. Plaintif-plaintif memilih untuk tidak membantah jualan itu mahu pun memohon campur tangan mahkamah untuk

menghentikannya, tetapi sebaliknya memohon ganti rugi untuk kecuaian dan/atau konspirasi oleh defendan-defendan kerana secara salah menjual unit-unit penyelesaian itu. Berdasarkan keterangan, hakim perbicaraan mendapati bahawa plaintif-plaintif adalah pemilik benefisial penyelesaian itu. Mahkamah Tinggi dengan itu mendapati untuk menyebelahi plaintif-plaintif terhadap defendan-defendan pertama hingga keempat dalam kedua-dua saman. Defendan-defendan pertama hingga keempat telah diarahkan untuk secara bersama dan berasingan membayar plaintif-plaintif ganti rugi bagi menggantikan pelaksanaan sepsifik dan ganti rugi tambahan berjumlah RM50,000. Ini adalah rayuan defendan-defendan terhadap keputusan tersebut atas alasan bahawa hakim perbicaraan telah, antara lain, gagal untuk sewajarnya mempertimbangkan bahawa penyelesai tiada pengetahuan tentang unit-unit penyelesaian itu; bahawa perjanjian penyelesaian itu tidak sah kerana mereka telah dimasuki melalui penipuan yang dilakukan ke atas Dirga; dan bahawa hakim perbicaraan terkhilaf menilai keterangan di hadapannya.

Diputuskan, membenarkan sebahagian daripada rayuan dengan kos RM50,000 kepada plaintif-plaintif:

(1) Walau pun defendan kedua menafikan pengetahuan tentang pemunyaan benefisial plaintif-plaintif berhubung unit-unit penyelesai itu, keterangan menunjukkan sebaliknya. Defendan kedua memohon untuk menggantikan pegawai penerima sebagai penyelesai defendan pertama, dan plaintif-plaintif, atas permohonan defendan kedua telah menyokong permohonan tersebut di hadapan mahkamah penggulungan. Justeru, defendan kedua patut mengetahui tentang kepentingan plaintif-plaintif dalam penggulungan Dirga. Tanpa pengetahuan tentang petisyen penggulungan itu ia tidak dapat dijelaskan bagaimana defendan kedua boleh bersemukakan dengan plaintif-plaintif, dan pemiutang-pemiutang lain, untuk menyokong permohonannya untuk lantikan sebagai penyelesai Dirga. Dalam keadaan berikut, hakim perbicaraan adalah betul kerana mendapati keterangan defendan-defendan kedua dan ketiga bahawa mereka tiada rekod tentang sebab penggulungan mahu pun milikan plaintif-plaintif berhubung unit-unit penyelesaian itu sebagai suatu yang menakjubkan (lihat perenggan 19–22).

(2) Apabila defendan kedua mengambil alih sebagai penyelesai Dirga, terdapat rayuan yang belum selesai di Mahkamah Rayuan terhadap penghakiman yang diperoleh berkenaan perjanjian penyelesaian yang telah dimasuki oleh plaintif-plaintif untuk menjamin unit-unit penyelesaian tersebut. Defendan kedua telah menarik balik rayuan tersebut. Jika defendan kedua memikirkan bahawa perjanjian penyelesaian adalah tidak sah atau bahawa ia adalah suatu penipuan yang dilakukan pada Dirga, maka dia patut telah meneruskan dengan rayuan itu dan bukan menarik baliknya. Dalam apa keadaan Dirga tidak mencabar atau mempertikaikan milikan unit-unit penyelesaian

A plaintif-plaintif itu. Oleh demikian, hakim perbicaraan adalah betul untuk menolak cabaran defendan kedua dengan menggunakan doktrin res judicata. Selain itu, defendan ketiga telah mengarahkan peguamcaranya untuk mengeluarkan notis tuntutan kepada plaintif-plaintif dalam salah satu daripada sama sivil yang menuntut baki B caj penyelenggaraan atas asas bahawa plaintif-plaintiif adalah pemunya benefisial dua unit penyelesaian tersebut. Justeru, defendan-defendan memperakui kesahan perjanjian penyelesaian itu dan pemunyaan benefisial plaintif-plaintif untuk sekurang-kurangnya dua unit penyelesaian tersebut. Oleh itu, mereka sekarang diestopkan daripada C berhujah sebaliknya. Doktrin estopel akan menghalang mereka daripada berbuat demikian (lihat perenggan 25–27).

(3) Tiada keterangan menunjukkan bahawa pegawai-pegawai Dirga telah mengemukakan penyataan urusan kepada pegawai penerima atau defendan kedua. Penyataan urusan akan menunjukkan siapa pemiutang D Dirga, dan pemunyaan benefisial plantif-plaintif berhubung unit-unit penyelesaian itu. Selanjutnya, selepas menerima penyataan urusan itu, s 235 Akta Syarikat 1965 mengenakan kewajipan mandatori ke atas defendan kedua sebagai penyelesai Dirga untuk mengemukakan laporan E awal kepada mahkamah penggulungan. Tambahan pula, perintah mahkamah yang melantik defendan kedua sebagai penyelesaian Dirga juga telah mengarahkannya menjalankan fungsinya sebagai penyelesaian bersama dengan Jawatankuasa Siasatan. Walau bagaimanapun, tiada Jawatankuasa Siasatan telah dibentuk oleh defendan kedua, yang mana F kewajipannya adalah untuk memanggil mesyuarat pemiutang dan penyumbang untuk pembentukan yang sama. Justeru, defendan-defendna kedua dan ketiga telah bertindak sebagai penyelesai-penyelesai Dirga yang jelas bertentangan dengan perintah mahkamah, yang telah mengarahkan mereka untuk bertindak bersama G dengan Jawatankuasa Siasatan. Dalam keadaan itu, hakim perbicaraan telah membuat penentuan yang betul bahawa defendan-defendan telah gagal untuk menubuhkan Jawatankuasa Siasatan, dengan itu menafikan pemiutang-pemiutang, termasuk plaintif-plaintif, untuk bersuara dengan cara penyelesaian Dirga dijalankan. Berdasarkan keterangan, H tiada apa-apa dalam penemuan hakim perbicaraan bahawa tingkah laku defendan-defendan kedua dan ketiga tidak memenuhi piawai tingkah laku profesional yang dijangkakan daripada mereka sebagai pegawai-pegawai mahkamah (lihat perenggan 29, 32–33 & 36–37).

(4) Empat tahun selepas pelantikannya sebagai penyelesai, defendan kedua I telah memperoleh perintah letak hak menurut s 233 Akta tersebut untuk menjaga dan mengawal semua unit-unit yang tidak dituntut di Pandan Safari Parade dan menjualnya, yang termasuklah unit-unit penyelesaian

plaintif-plaintif. Walau bagaimanapun, hakim perbicaraan adalah betul kerana mendapati perintah letak hak itu terbatal dan tidak mengikat plaintif-plaintif, kerana mereka bukan pihak-pihak di hadapan mahkamah apabila perintah letak hak itu dibuat. Ini adalah kerana defendan kedua dalam memohon untuk perintah letak hak telah jelas bertindak di luar skop bidang kuasa dan kuasanya di bawah instrumen pelantikannya, iaitu perintah mahkamah itu. Sebelum defendan kedua memohon untuk dan memperoleh perintah letak hak, dia sepatutnya telah mengadakan mesyuarat pemiutang dan penyumbang bagi tujuan membentuk Jawatankuasa Siasatan, yang merupakan syarat di bawah mandate perintah mahkamah itu. Di bawah s 236(1) Akta tersebut seorang penyelesai boleh melaksanakan kuasanya hanya dengan kuasa mahkamah atau Jawatankuasa Siasatan. Dalam hal ini penyelesai perlu mengambil kira hasrat dan arahan Jawatankuasa Siasatan sebagaimana dikehendaki di bawah s 237 Akta tersebut. Walau bagaimanapun, defendan kedua telah gagal berbuat demikian. Oleh itu, hakim perbicaraan dengan sewajarnya telah memutuskan bahawa perintah letak hak itu adalah terbatal. Dalam apa keadaan, tanpa mengetepikan perintah letak hak itu, tidak menjejaskan dapatan liabiliti berkenaan kecuaian kerana pelanggaran kewajipan (lihat perenggan 38–41, 45–46 & 51).

(5) Jumlah ganti rugi yang diawardkan oleh Mahkamah Tinggi adalah betul-betul jumlah yang diterima oleh defendan kedua daripada jualan unit-unit penyelesaian itu. Ukuran ganti rugi dengan itu adalah mengikut prinsip yang ditetapkan, iaitu pampasan yang adil untuk kerugian nilai hartanah. Justeru hakim perbicaraan adalah betul dalam memutuskan bahawa harga jualan adalah disebabkan kerugian sebenar yang dialami oleh plaintif-plaintif. Walaupun Mahkamah Tinggi mendapati bahawa fakta kes mewajarkan award untuk ganti rugi tambahan dan teladan, tiada asas untuk ini. Tiada keterangan berhubung kerugian tambahan dialami oleh plaintif-plaintif dan fakta kes tidak menunjukkan ianya terjatuh dalam mana-mana kategori yang dinyatakan dalam kes *Rookes v Barnard* [1964] 1 All ER 367 untuk award ganti rugi teladan (lihat perenggan 50 & 52).]

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567, CA (refd)

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals [2012] 1 MLJ 761; [2012] 2 CLJ 16, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Government of Malaysia v Dato Chong Kok Lim [1973] 2 MLJ 74; [1973] 1

A LNS 35 (refd)
Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)
Imej Muhibah Sdn Bhd v Pintar Asiamas Sdn Bhd (in liquidation) & Or [2019] 5 MLJ 744; [2019] 7 CLJ 590, CA (refd)
B *Ng King Chong & Anor v Ooi Kim Geik & Ors* [2019] 2 MLJ 398; [2019] 2 CLJ 246, CA (refd)
Rookes v Barnard [1964] 1 All ER 367, HL (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (refd)
C *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374, FC (refd)
T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v Public Bank Bhd [2018] 5 MLJ 711; [2018] 6 CLJ 1, FC (refd)
D *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2019] 3 MLJ 510; [2019] 2 CLJ 48, CA (refd)
Yap Yew Cheong & Anor v Dirga Niaga (Selangor) Sdn Bhd [2005] 7 MLJ 660, HC (refd)

E **Legislation referred to**

Companies Act 1965 (repealed by Companies Act 2016) ss 218(2), 233, 234, 235, 236(2), (3), 237, 241(1), 242(1)
Companies Act 2016 s 485

F **Appeal from:** Civil Suit Nos 22 NCVC-318–06 of 2015 and NCVC-317–06 of 2015 (High Court, Kuala Lumpur)

Ranjan N Chandran (Sabrina Shanthini Richards, Shobah Veera and Chandni Anantha Krishnan with him) (Hakem Arabi & Assoc) in Civil Appeal
G *Nos W-02(NCvC)(W)-1972–09 of 2018 and W-02(NCvC)(W)-1973–09 of 2018 for the appellants.*
HC Yap (H Jee with him) (Tho, Hock & Chwan) in Civil Appeal No W-02(NCvC)(W)-1972–09 of 2018 for the respondents.
Ravin Woodhull (Ooi Wei Neng and Goh Rhen-Jeat with him) (Mak, Ng & Lim)
H *in Civil Appeal No W-02(NCvC)(W)-1973–09 of 2018 for the respondents.*

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

I **[1]** Two suits, namely, Civil Suit No 22NCVC-317–06 of 2015 ('Suit 317') and Civil Suit No 22NCVC-318–06 of 2015 ('Suit 318'), were

filed by the respective plaintiffs (respondents in the two appeals before this court) in the High Court at Kuala Lumpur against six defendants, which included the first to fourth appellants in both appeals, who were the first to fourth defendants in both suits.

[2] Whilst the plaintiffs in each of the suits were different, the defendants in both suits were identical. Both the suits were heard together, and at the conclusion of the trial, the High Court found that the plaintiffs in both the suits had successfully proven their claim against the first to fourth defendants for negligence. The plaintiffs' claim against the remaining defendants were however dismissed with costs. The first to fourth defendants appealed both decisions.

[3] The learned High Court judge delivered a single judgment for both suits, and one common grounds of judgment. Hence, both appeals were heard together.

[4] Whilst affirming most of the learned trial judge's findings and decision, we, however, allowed the appeals in part; particularly in respect of aggravated and exemplary damages and costs awarded on an indemnity basis. The following are the reasons for our decision.

[5] Reference to the parties shall be according to their description in the court below.

IN THE HIGH COURT

[6] WCT Engineering Bhd ('WCT') was appointed by Europlus Corp Sdn Bhd ('Europlus') and Maxisegar group of companies as main contractor for a construction project. The respondents (plaintiffs) in both suits were subcontractors appointed by WCT to perform certain subcontract works for that construction project.

[7] As a result of financial difficulties faced by Europlus, WCT was, instead of cash, offered payment in kind for work done in the form of transfer and/or assignment of properties, including commercial properties located in a development known as Pandan Safari Parade. WCT had accepted that offer of settlement by contra of properties. Similar offer was then made to the plaintiffs by WCT, which they also accepted.

[8] The plaintiffs then entered into separate settlement agreements with Europlus and WCT, wherein the plaintiffs accepted properties in Pandan Safari

Parade to set off (contra) payment of the debt due to the plaintiffs from WCT. The two settlement agreements are:

(a) settlement agreement dated 23 January 1998 between the plaintiff in Suit 317, Europlus and WCT, wherein the plaintiff in Suit317 accepted two units of commercial properties identified as Units PP-F22 and PP-F23 in Pandan Safari Parade from the first defendant (ie the first appellant) as settlement of monies due to them, or as in local parlance contra payment. The plaintiff also simultaneously entered into two separate sale and purchase agreements and deeds of mutual covenants with the first defendant, all of which were dated 23 January 1998; and

(b) settlement agreement dated 23 January 1998 between the plaintiffs in Suit 318, Europlus and WCT, wherein the plaintiffs in Suit 318 accepted three units of commercial properties identified as Units PP-F10, PP-F41 and PP-F42 in Pandan Safari Parade from the first defendant (ie the first appellant) as settlement of monies due to them, or as in local parlance contra payment. The plaintiffs also simultaneously entered into three separate sale and purchase agreements and deeds of mutual covenants with the first defendant, all of which were dated 23 January 1998.

[9] The respective sale and purchase agreements provided for the first defendant to deliver vacant possession of these settlement units to the respective plaintiffs free from encumbrances. It was also a term of the sale and purchase agreements that the 151 defendant shall redeem the properties from existing charges in favour of Amanah Merchant Bank ('chargee') within six months from the date of the agreements and to deliver respective letters of disclaimer of interest from the chargee addressed to the respective plaintiffs.

[10] The first defendant delayed the redemption exercise with the chargee bank, which resulted in late payment interest being imposed by the chargee. The plaintiffs settled the late payment interest with the chargee and subsequently commenced action against the first defendant to claim for the same. The plaintiffs in Suit 318 obtained judgment against the first defendant for the sum of RM405,623.32 with interest and cost at the High Court vide Civil Suit No S6-22–533 of 2004 ('Suit 533'). Whilst, the plaintiff in Suit 317 obtained judgment against the first defendant for the sum of RM227,685.16 with interest and cost at the sessions court vide Suit No 11–8727 of 2004 ('Suit 8727').

[11] The first defendant failed to satisfy both judgments and the plaintiffs in Suit 318 filed a winding up petition against the first defendant, after having

issued the statutory notice under the Companies Act 1965 ('the 1965 Act'). The plaintiff in Suit 317 supported that petition as supporting creditor. The winding up court heard the petition and a winding up order was made against the first defendant on 28 March 2006. The official receiver was appointed the provisional liquidator of the first defendant.

[12] Subsequently, on 1 December 2008 the second defendant (second appellant) was appointed by the court as the liquidator of the first defendant in place of the official receiver. The second defendant's appointment as liquidator was supported by the plaintiffs. The third defendant (third appellant) is the second defendant's authorised representative to carry out the liquidation of the first defendant, through the medium of the fourth defendant (fourth appellant) company, ofwhich the second and third defendants were co-directors.

[13] Sometime in 2014, the plaintiffs discovered that all their five units of properties under both the settlement agreements were occupied by third parties, who were strangers to the plaintiffs. Upon further enquiry, the plaintiffs found that their respective units under both the settlement agreements had been sold off to the fifth defendant. The plaintiffs then procured leave from the winding up court and commenced Suit 317 and Suit 318 against the defendants for recovery and return of their respective properties under the settlement agreements or damages in lieu thereof.

[14] The fifth defendant, as purchaser, had in turn charged the properties to the sixth defendant as security for a loan granted to the fifth defendant. Before trial commenced, the properties were redeemed from the sixth defendant and the properties were reassigned to the fifth defendant. Hence, the sixth defendant applied to strike out the claim against them, and it was allowed by the High Court.

[15] In the course of trial, it was discovered that the fifth defendant had sold off all the plaintiffs' units in Pandan Safari Parade to Paradise Boulevard, a third party, in early 2018. However, the plaintiffs did not contest that sale nor seek the court's intervention to stop it, but instead proceeded with both the suits against the first to fifth defendants, essentially seeking damages for negligence and/or conspiracy by the defendants in wrongfully disposing or selling their properties under the settlement agreements.

THE HIGH COURT'S DECISION

[16] The learned High Court judge found in favour of the plaintiffs against the first to fourth defendants in both suits and made the following orders:

(a) a declaration that the plaintiffs were the beneficial owners of their respective five units of property in Pandan Safari Parade;

(b) in lieu of prayers (b)–(f) for specific performance, the first to fourth defendants are to jointly and severally pay the plaintiffs damages in the following sums:

Suit 318 (Civil Appeal 1972):

(i) Lot PP-F10 — RM266,800;
(ii) Lot PP-F41 — RM290,950; and
(iii) Lot PP-F42 — RM290,950.

Suit 317 (Civil Appeal 1973):

(i) Lot PP-F22 — RM207,575; and
(ii) Lot PP-F23 — RM207,575.

(c) the first to fourth defendants are to jointly and severally pay the plaintiffs in Suit 318 aggravated damages in the sum of RM50,000; and

(d) the first to fourth defendants are to jointly and severally pay each of the plaintiffs in both Suits 317 and 318 aggravated damages in the sum of RM50,000 for each suit.

ISSUES IN THIS APPEAL

[17] The first to fourth defendants, ie the appellants in both cases have, in challenging the judgment of the High Court, primarily raised issues as regards the alleged failure of the learned trial judge to properly evaluate the evidence in making his findings, particularly as to:

(a) whether the liquidator had knowledge of the plaintiffs' beneficial ownership of the five units of properties in Pandan Safari Parade arising from the settlement agreements;

(b) whether the settlement agreements were invalid and was an act of fraud perpetrated on the first defendant;

(c) whether the liquidator had failed to comply with the provisions of s 235 of the 1965 Act (now s 485 of the Companies Act 2016);

(d) whether the liquidator had failed to comply with the terms of the court order dated 1 December 2008 appointing the first defendant as liquidator;

(e) whether there was inconsistent and evasive testimony by the third defendant in the course of trial;

(f) whether the conduct of the second and third defendants had met the

standard of officers of the court;

(g) whether the vesting order dated 18 December 2012 obtained by the second defendant entitled and allowed the second defendant to sell and dispose the plaintiffs' five units and thus absolving them from liability towards the plaintiffs; and

(h) whether the plaintiffs' failure to return and deliver the verification process documents to the first, second and/or third defendants shall be taken to mean that the plaintiffs' five units of properties are part of the assets of the first defendant.

[18] Most of the issues raised in both these appeals are in relation to findings of fact by the learned trial judge, and in that regard it is well settled that the appellants will have to demonstrate that the learned trial judge was plainly wrong in his assessment of the evidence placed before him. See: *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1. However, we find that in coming to his determination of these factual issues, the learned judge had indeed evaluated the evidence in its totality and his findings are well supported by evidence.

[19] In coming to that conclusion, we have delved into the issues, one at a time, and evaluated the learned trial judge's findings against the overall evidence, as follows.

Whether the liquidator, ie the second defendant, had knowledge of the plaintiffs' beneficial ownership of the five units of strata property in Pandan Safari Parade in accordance to the settlement agreements

[20] The second defendant denied knowledge of the plaintiffs' beneficial ownership of the five units of strata property in Pandan Safari Parade in accordance to the two settlement agreements. However, the evidence shows otherwise.

[21] The plaintiffs had taken separate actions against the 151 defendant, one in the High Court and the other in the sessions court, based on their respective beneficial interest in the five units of properties. The plaintiffs in Suit 318 obtained judgment against the first defendant for the sum of RM405,623.32 with interest and cost, whilst the plaintiff in Suit 317 obtained judgment against the first defendant for the sum of RM227,685.16 with interest and cost. The first defendant had defended both actions and at no time did the first defendant deny the plaintiffs' beneficial interest in the settlement property, nor

A did the first defendant challenge the validity of the settlement agreements in those proceedings.

[22] The winding up of the first defendant was at the behest of the plaintiffs, one as the petitioning creditor and the others as supporting creditors. The B second defendant sought to replace the official receiver as the liquidator of the first defendant, and the plaintiffs, upon the request of the second defendant's solicitors, supported that application before the winding up court. Hence, the second defendant would have known of the plaintiffs' interest at and in the winding up of the first defendant, and in — particular that their interest arose C from a judgment based on the two settlement agreements. Without knowledge of the winding up petition it is inexplicable as to how the second defendant would have approached the plaintiffs, and other creditors, to support his application for appointment as liquidator of the first defendant.

D

[23] In this regard, we concur with the findings of the learned trial judge that the testimony of the second and third defendants that they had no records on the cause of the winding up nor the plaintiffs' ownership of the five units of property via the settlement agreements was incredible, as the contrary is borne E out by evidence.

[24] In fact, documentary evidence shows that the solicitor for the first to fourth defendants, Ms Sabrina Richards, had attended the first defendant's creditors' meeting on two occasions, namely, on 1 June 2008 and 3 July 2008, F together with the plaintiffs' solicitor, Ms Norhakmawati bt Basnan. Hence, the first to fourth defendant's solicitor had knowledge of the plaintiffs' interest in the winding up of the first defendant. The law is trite in that the knowledge of the solicitor can be imputed to the client. See: *T Sivam a/l Tharamalingam (as representative/administrator for the estate of Nagamuthu a/l Periasamy, deceased) v* G *Public Bank Bhd* [2018] 5 MLJ 711; [2018] 6 CLJ 1 (FC).

[25] At the time of the second defendant's appointment as the liquidator, there was an appeal by the first defendant pending at the Court of Appeal, H which was in respect of one of the judgments obtained by the plaintiffs in the High Court. The second defendant had instructed his solicitors, Messrs Hakem Arabi & Associates, to discontinue the appeal. Surely, such instructions could not have been given without the second defendant having studied the appeal record and taken solicitor's advice. Hence, it is inconceivable that the I second defendant did not know of the circumstances leading to the two suits by the plaintiffs and the existence of the settlement agreements from which the plaintiffs derive their interest in pursuing those two suits. The terms of the settlement agreements clearly spell out the plaintiffs' beneficial interest in the five units of property.

Whether the settlement agreements were invalid and were an act of fraud perpetrated on the first defendant

[26] The first to fourth defendants contend that the settlement agreements were invalid and an act of fraud on the first defendant. However, when defending both Suit 533 and Suit 8727, the first defendant had every opportunity to challenge the validity of the settlement agreements, but did not. In fact, when the second defendant took over as the liquidator of the first defendant, there was an appeal pending in the Court of Appeal against the judgment in Suit 533, and the second defendant instructed the 151 defendant's solicitors to withdraw the appeal. If the second defendant thought that the settlement agreement was invalid or that it was a fraud perpetrated on the first defendant, then instructions ought to have been given to the solicitors to proceed with the appeal at the Court of Appeal, instead of withdrawing it. In fact, the 151 defendant when resisting both Suit 533 and Suit 8727 did not challenge or dispute the plaintiffs' ownership of the five units in the settlement agreements.

[27] In this regard, we find that the learned trial judge was correct to reject this argument by invoking the doctrine of res judicata. The cases on res judicata are replete. For convenience we will merely refer to the Federal Court's decision in *Government of Malaysia v Dato Chong Kok Lim* [1973] 2 MLJ 74; [1973] 1 LNS 35.

[28] In addition to that, the third defendant had appointed Jova Building Services ('Jova'), as building managers to manage Pandan Safari Parade. Jova had instructed solicitors to issue a notice of demand to the plaintiff in Suit 317 (respondent in Appeal 1973) claiming outstanding maintenance charges on the basis that the plaintiff in Suit 317 was beneficial owner of the two units of commercial properties identified as Units PP-F22 and PP-F23, as per the settlement agreements. Hence, the first to fourth defendants have acknowledged the validity of the settlement agreements and the plaintiff in Suit 317's beneficial ownership of Units PP-F22 and PP-F23. Thus, they are now estopped from arguing the contrary. The doctrine of issue estoppel will bar them from doing so.

Whether the liquidator had failed to comply with the provisions of s 235 of the Companies Act 1965 (now s 485 of the Companies Act 2016)

[29] Section 234 of the Companies Act 1965 requires the officers of a wound up company to submit a statement as to the affairs of the company as at the date of the winding up order showing:

(a) the particulars of its assets, debts and liabilities;

A (b) the names and addresses of its creditors;

(c) the securities held by them respectively;

(d) the dates when the securities were respectively given; and

B (e) such further information as is prescribed or as the official receiver or the liquidator requires.

[30] There is no evidence showing that the officers of the first defendant had submitted the statement of affairs to the official receiver or the second C defendant. Nor is there any explanation from the second defendant as to why the statement of affairs was not procured from the officers of the first defendant when he took over as liquidator. The statement of affairs would have shown who the creditors of the first defendant were, and the plaintiffs' beneficial ownership of the five units of property in the settlement agreements would D have been made known.

[31] Further, upon receipt of the statement of affairs, s 235 of the Companies Act 1965 imposes a mandatory duty on second defendant as liquidator of the first defendant to submit a preliminary report to the winding up court. The E preliminary report shall contain information:

(a) as to the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;

(b) if the company has failed, as to the causes of the failure; and

F (c) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the business thereof.

G **[32]** The second defendant may also, if he thinks fit, make further reports stating whether in his opinion any fraud has been committed or whether any officer of the company has contravened or failed to comply with the 1965 Act. Hence, if the second defendant thought that the officers of the first defendant had committed fraud in entering into the settlement agreements, he ought to H have first obtained the statement of affairs and then submit the preliminary report to the court as mandated under s 235 of the 1965 Act. Owing to this failure by the second defendant to submit the preliminary report, the learned trial judge had correctly found that the court was unable to verify the steps taken by the liquidator to identify the creditors of the first defendant before I applying to the court for the vesting order wherein the five units of property were deemed to be owned by the first defendant.

Whether the liquidator had failed to comply with the terms of the court order dated 1 December 2008 appointing the first defendant as liquidator

[33] The second defendant was appointed the liquidator of the first defendant vide court order dated 1 December 2008, and the relevant terms of the order states as follows:

> MAKA ADALAH DIPERINTAHKAN bahawa Encik Augustine a/l TK James (No KIP: 570902-10-6061) dari Tetuan Radiant Consulting Asia Sdn Bhd, Suite 8-11-3U, 11th Floor, Menara Mutiara Bangsar, Jalan Liku Off Jalan Riong, 59100 Kuala Lumpur sebagai Pelikuidasi tersebut diatas dengan satu Jawatankuasa Pemeriksaan ...

Clearly the court order dated 1 December 2008 directed that the second defendant carry out his function as liquidator together with a Committee of Inspection. Section 242(1) of the 1965 Act provides for the composition of such a committee in the following terms:

> (1) The committee of inspection shall consist of creditors and contributories of the company or persons holding —
>
> (a) general powers of attorney from creditors or contributories; or
>
> (b) special authorities from creditors or contributories authorising the persons named therein to act on such a committee,
>
> appointed by the meetings of creditors and contributories in such proportions as are agreed or in case of difference as are determined by the Court.

[34] However, no Committee of Inspection was formed by the second defendant, whose duty it would have been to call for the meeting of creditors and contributories for the formation of the same. Hence, the second and third defendants had acted as liquidators of the first defendant in clear contravention of the court order dated 1 December 2008, which directed them to act together with a Committee of Inspection. Hence, the learned trial judge had made the correct determination that the second to fourth defendants had deliberately failed to establish the Committee of Inspection, thus depriving the creditors, including the plaintiffs, a say in the manner in which the liquidation of the first defendant was carried out.

Whether there was inconsistent and evasive testimony by the third defendants in the course of the trial

[35] The learned trial judge had adverted to the inconsistent and evasive testimony of the third defendant on whether the liquidator had obtained the winding up documents from the office of the official receiver. At the trial, the third defendant testified that no documents were received from the official

receiver, whilst in the earlier sessions court proceedings in Suit No A52NCVC-163–04 of 2014 ('Suit 163') he had testified to the contrary. When confronted with the notes of proceedings from Suit 163, the third defendant changed his testimony and confirmed that he had in fact received the documents from the official receiver's office.

[36] Learned counsel for the appellants submits that there is no inconsistency or evasive testimony as observed by the learned trial judge as the testimony in the sessions court was for an entirely separate claim by the first defendant against the purchaser of another unit for arrears in maintenance charges. We do not find any merit in that contention. The fact of whether the documents pertaining to the winding up of the first defendant were obtained from the official receiver, who was the first liquidator appointed by the court is generic to all claims, and the answer must be the same, whether the question is asked in Suit 163 or in any other suit. In this regard, we find that the learned trial judge's observation on the inconsistent and evasive testimony of the third defendant, as well as his credibility, is well supported by evidence, and there is no basis for appellate intervention to disturb that finding.

Whether the conduct of the second and third defendants had met the standard of officers of the court

[37] The learned trial judge had made the following findings:

(a) the second and third defendants had failed to comply with not only the provisions of s 235 of the 1965 Act, but also the court order dated 1 December 2008 requiring the formation of a Committee of Inspection;

(b) the first to fourth defendants failed to call any witnesses from Messrs Susielan & Associates or Jova to explain the issuance of the s 218(2) notice under the 1965 Act to the plaintiff in Suit 317 for arrears in maintenance charges for the units that are beneficially owned by the plaintiff in Suit 317 pursuant to the settlement agreement;

(c) the second defendant had instructed Messrs Hakem Arabi & Associates to withdraw the appeal pending at the Court of Appeal in respect of the judgment in Suit 533 where the plaintiff had sued the first defendant for late payment interest under the settlement agreement. The judgment of the High Court in Suit 533 is reported as *Yap Yew Cheong & Anor v Dirga Niaga (Selangor) Sdn Bhd* [2005] 7 MLJ 660. In paras 2–4 of the said judgment the learned judge had stated:

> 2. Factually speaking, *the appeal centred on three agreements entered into between the plaintiffs and the defendant. These agreements are not the standard sale and purchase agreements* under the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Developers (Control

and Licensing) Act 1966. In fact, *these three agreements are 'set off' agreements entered into for purposes of setting off all the debts due from Europlus Corp Sdn Bhd to WCT Engineering Bhd*. The defendant is an associate or a subsidiary to Europlus Corp Sdn Bhd while the plaintiffs are the directors of WCT Engineering Bhd. These three agreements are drafted by the plaintiffs' solicitors and they are, incidentally, the solicitors representing the plaintiffs in this action.

3. It was a term in these agreements that the defendant shall within six months from 23 January 1998 (the date of the sale and purchase agreements) redeem the said parcels (which will be referred to shortly) and deliver to the plaintiffs a letter of disclaimer failing which the defendant shall pay to the plaintiffs as purchasers 12% interest on daily rests on the purchase price from the expiry of the six months to the date of actual redemption ('the LAD').

4. *The plaintiffs purchased Parcel No F 10 at RM371,200 with LAD at RM146,323.98, Parcel No F 41 at RM328,900 with LAD at RM129,649.67 and Parcel No F 42 at RM328,900 with LAD at RM129,649.67.* The total LAD came up to RM405,623.32. It was quite substantial. (Emphasis added.)

Hence, from the judgment it is clear that the first and second defendants as well as their solicitors, Messrs Hakem Arabi & Associates knew of the existence and nature of the settlement agreements and the plaintiffs' beneficial interest in the three units. Despite that knowledge, the second defendant discontinued the first defendant's appeal, which is indicative of the fact that the first and second defendants had accepted the plaintiffs' rights and beneficial interest in the said properties pursuant to the settlement agreements; and

(d) when there was an application by the first defendant to substitute the official receiver with the second defendant as liquidator, the second defendant's solicitors had written to the plaintiffs' solicitors, ie Messrs Yip & Co, asking for the plaintiffs' support for the second defendant to take over as liquidator, hence the second defendant and/or their solicitors would have been well aware of the interests of the plaintiffs in the winding up of the first defendant as it flowed from the two judgments obtained by the plaintiffs based on the breaches of the terms of the settlement agreement by the first defendant. And when this is compounded by the failure of the second and third defendants to make proper enquiries from the officers of the first defendant and procure the statement of affairs, the denial of knowledge of the plaintiffs' beneficial interest in the five units of property rings hollow. Thus, their application for the vesting order to sell the five units without disclosure to the court of the plaintiffs' beneficial interest therein is at best an act of gross negligence.

[38] Based on these findings, the learned trial judge found that the conduct of the second and third defendants did not meet the standards of professional conduct expected of them as officers of the court. And we do not find anything amiss in that finding.

Whether the vesting order dated 18 December 2012 obtained by the second defendant entitled and allowed the second defendant to sell and dispose the plaintiffs' five units and thus absolving the first to fourth defendants from liability towards the plaintiffs

[39] The second defendant, had some four years after his appointment as liquidator, obtained a vesting order pursuant to s 233 of the 1965 Act to take into custody and control all the unclaimed units in Pandan Safari Parade and sell them. And that included an order to sell the plaintiffs' five units in the settlement agreement, which had been listed as unclaimed. The vesting order was obtained from the winding up court in Schedule 1 of the vesting order, the plaintiffs' five units are listed.

[40] Learned counsel for the first to fourth defendants contends that since there is no relief sought by the plaintiffs in the amended writ and statement of claim in the present proceedings to set aside the said vesting order, the vesting order as an order of the winding up court is valid and subsisting. Hence, learned counsel submits that the finding by the learned trial judge that the vesting order is a nullity and not binding on the plaintiffs (who were not parties before the court when the vesting order was made) is plainly wrong. Learned counsel for the plaintiffs argues otherwise.

[41] Now, it is clear that the vesting order was not obtained in accordance to law and it had not been set aside. In fact, the learned trial judge had been mindful of this when he said in the judgment:

> At this juncture, it would be remiss if I fail to state that I make the above finding despite knowing that the vesting order obtained by the Defendants has not been set aside ...

[42] The second defendant in applying for the vesting order was clearly acting outside his scope of jurisdiction and power under the instrument of his appointment, namely, the order dated 1 December 2004. Before the second defendant could have made this application, and obtain the order to dispose of the assets that is alleged to belong to the first defendant, he should have first convened the meeting of creditors and contributories for the purposes of forming the Committee of Inspection, which was a condition mandated by the court order dated 1 December 2004. A similar situation arose in *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761; [2012] 2 CLJ 16 where there was non-compliance of the order of court

appointing the liquidator, and the Court of Appeal held:

> [84] Here, the liquidator knew that he was appointed by consent with the committee of inspection. The High Court order dated 26 July 2001 is clear on this and it has not been set aside. Yet the liquidator acted unilaterally and gave RM5 million discount and entered into the SPA with North Plaza for the sale of the lands on 9 January 2007 and then he applied to the High Court by way of encl. 71 to seek approval of that sale. Obedience to the High Court order dated 26 July 2001 is a requirement of the law. Abdul Hamid Omar LP in *Wee Chao Keong v MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 MLJ 123; [1993] 3 CLJ 210, SC, at p 212 aptly said:
>
> > Obedience to court order
> >
> > It is established law that a person against whom an order of court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of court runs the risk of being held in contempt with all its attendant consequences.
>
> [85] Continuing at p 213, Abdul Hamid Omar LP succinctly said:
>
> > Orders of court must be treated with respect and require strict obedience.
>
> [86] In *Hadkinson v Hadkinson* [1952]2 All ER 567, CA, at 569, Romer LJ had this to say:
>
> > It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.
>
> [87] Sir John Donaldson in *Howitt Transporl Ltd v Transporl and General Workers' Union* [1973] 1 CR 1 at 10, observed that:
>
> > First, orders of any court must be complied with strictly in accordance with their terms. It is not sufficient, by way of answer to an allegation that a court order has not been complied with, for the person concerned to say that he 'did his best'. The only exception to that proposition is where the court order itself only orders the person concerned to 'do his best'. But if a court order requires a certain state of affairs to be achieved, the only way in which the order can be complied with is by achieving that state of affairs.
>
> [88] *Was there obedience to the High Court order dated 26 July 2001 by the liquidator? Certainly not* and this question was not considered by the learned High Court Judge when approving the sale of the lands to North Plaza. In our judgment, *the learned High Court Judge erred in law and in fact, in failing to appreciate the terms and effect of the High Court order dated 26 July 2001 which provides that the liquidator be appointed to act with a committee of inspection.* The learned High Court Judge erred in holding that the words 'bersama dengan Jawatankuasa Pemeriksaan' which

A appear in the High Court order dated 26 July 2001 merely echo the provisions of sub-s 241(1) of the Companies Act 1965.

[89] The learned High Court Judge failed to appreciate the provisions of s 237(1) of the Companies Act 1965 which regulates the exercise and control of the liquidator's power. It provides that the liquidator shall in the administration of the assets of the company and distribution have regard to the directions given by resolution of the creditors/contributories or by the committee of inspection. (Emphasis added.)

[43] Similarly, in the present case the winding up court had made a determination that the second defendant, as liquidator, shall act together with a Committee of Inspection. Hence, the second defendant is required to do so by the order of the court appointing him, but chose to willfully disregard that court mandated stipulation. Section 241(1) of the 1965 Act provides that the Committee of Inspection is 'to act with the liquidator'. A liquidator can exercise his powers under s 236(1) of the 1965 Act only with the authority of the court or of the Committee of Inspection. In that respect the liquidator would have had to have regard to the wishes and directions of the Committee of Inspection as required under s 237 of the 1965 Act. This the second defendant failed to do.

[44] Section 236(2) of the 1965 Act gives the liquidator power to sell immovable property of a company in liquidation. However, that power is subject to control of the court as provided in s 236(3) of the 1965 Act. In this regard, in *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* the court further held:

[94] It cannot be denied that the learned High Court Judge failed to appreciate that the liquidator does not have unfettered powers to act as he deems fit. He is limited in the exercise of his powers by the High Court order dated 26 July 2001 as well as the Companies Act 1965, to act with the committee of inspection.

[95] By way of encl 71, the liquidator sought the sanction of the High Court for the sale of the lands. The lands were the only assets of City Centre. The learned High Court judge failed to appreciate that directions of the committee of inspection are mandatory for such sale. It is not an option on the part of the liquidator to act without the committee of inspection. In our judgment, the sale of the lands to North Plaza is tainted and sanction for the same should not have been granted by the learned High Court Judge.

And hence the Court of Appeal concluded that:

[117] ... Now, *the High Court order dated 26 July 2001 mandated the setting up of the committee of inspection and the liquidator has to take into account the wishes of the committee of inspection. The learned High Court judge in granting the approval for the sale failed to recognise the importance of establishing the committee of inspection and the need for the liquidator to have regard to the wishes of the creditors and contributories particularly in the light of the terms of the High Court order dated 26 July 2001.*

> [118] *In our judgment, the liquidator acted in breach of the High Court order dated 26 July 2001 and he cannot use the court to legalise his unlawful acts.* This court has the jurisdiction to stop the sale to North Plaza when there is lack of good faith and error in law. (Emphasis added.)

Likewise, in our judgment, we find that the second defendant, having acted in breach of the court order dated 1 December 2004, cannot use the vesting order that was obtained in breach of the law as a shield or cover to legitimise his unlawful acts.

[45] Additionally, before making the application for the vesting order, the second defendant should have obtained the statement of affairs of the first defendant from the officers of the first defendant, as this would have revealed the true nature of the first defendant's assets and liabilities. This is the very first thing that any liquidator would have done when taking charge of the liquidation of a company. We find it astounding that the second defendant, by extension of their relationship, the third and fourth defendants, did not carry out this very basic task required of a liquidator.

[46] Further, the first and second defendants knew of the beneficial interest the plaintiffs in the five units of property by virtue of Suit 533 and Suit 8727. And despite having that knowledge, the first and second defendants had included these five units as assets belonging to the first defendant when making the application for the vesting order. This was at worst a deception on the winding up court or at the very least gross negligence on the part of the first and second defendants in procuring the vesting order.

[47] Thus, we find that the learned trial judge was well placed to rule that the vesting order was a nullity, even though there was no specific prayer in the plaintiffs' amended statement of claim for the vesting order to be declared as such or set aside. The law is settled that a court can order a relief even if it is not expressly prayed for in the pleadings as the court is at liberty to fashion the appropriate remedy to fit the factual matrix of the case, and to grant such relief as merits the ends of justice. See: *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 (CA). In any event, where a High Court order is a nullity, a court of coordinate jurisdiction has the power under its inherent jurisdiction to set aside that order in any collateral proceeding. See *Imej Muhibah Sdn Bhd v Pintar Asiamas Sdn Bhd (in liquidation) & Or* [2019] 5 MLJ 744; [2019] 7 CLJ 590; *Ng King Chong & Anor v Ooi Kim Geik & Ors* [2019] 2 MLJ 398; [2019] 2 CLJ 246. Hence, there is nothing untoward in the learned trial declaring the vesting order a nullity and disregarding it.

Whether the plaintiffs' failure to return and deliver the verification process documents to the first, second and/or third defendant shall be taken to mean that the plaintiffs' five units are part of the assets of the first defendant

[48] Learned counsel for the first to fourth defendants submits that prior to applying for the vesting order, the second defendant had undertaken a verification exercise to obtain details of the purchasers and their ownership of the units. In this respect, the second defendant contends that letters were sent to plaintiffs and that there was no response from them. There is conflicting evidence as to whether the plaintiffs received these letters. However, we find that this verification exercise and the lack of response or otherwise from the plaintiffs does not detract from the fact that the first and second defendants had knowledge of the plaintiffs' beneficial ownership of the five units of property. A fact that the first and second defendants had accepted by their decision to discontinue their appeal to the Court of Appeal in respect of the findings of the High Court in Suit 533, where the settlement agreements and the beneficial interest of the plaintiffs are clearly mentioned in the judgment of that High Court.

[49] Hence, we find that nothing of importance turns on this issue of verification exercise and it does not absolve the first to fourth defendants of their liability in negligence.

[50] Given the disobedience of the court order dated 1 December 2004 in respect of the appointment of a Committee of Inspection, and given the glaring evidence of the first and second defendants' knowledge of the plaintiffs' beneficial ownership of the five units flowing from the settlement agreements, we find that the learned trial judge was entirely correct in his reasoning that the second, third and fourth defendants had unlawfully, wrongfully and negligently disposed the plaintiffs' five units, giving rise to the plaintiffs incurring loss. The learned trial judge had applied the correct principles of negligence, and found that the plaintiffs had established all the required elements of the tort. See *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567.

DAMAGES

[51] The amount of damages awarded by the High Court was exactly the amount received by the second defendant from the fifth defendant for the sale of the five units. We find the measure of damages to be in accordance to established principles, ie fair compensation for the loss of value of the properties. The sale of the five units to the fifth defendant was found by the learned trial judge to be a bona fide arm's length transaction at the prevailing market price. Hence, the sale price would be indicative of the actual loss

suffered by the plaintiffs. See *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; [1995] 2 CLJ 374 (FC).

[52] In the final analysis, we do not find any merit in the two appeals lodged except in respect of the grant of exemplary and aggravated damages. The learned judge had made substantial findings of fact relevant to the issues of liability in law for the tort of negligence. Those findings are supported overwhelmingly by both oral and documentary evidence. We concur with those findings. The non-setting aside of the vesting order, in our judgment, does not affect the finding of liability with regards to neglect of breach of duty. Glaringly is the failure to set up the committee of inspection, a specific order of the winding up court made at the time of the second defendant's appointment in 1 December 2008.

AGGRAVATED AND EXEMPLARY DAMAGES

[53] The High Court found that the facts of the case warranted the award of aggravated and exemplary damages and awarded:

(a) the sum of RM50,000 as aggravated damages to the plaintiffs in Suit 318; and

(b) the sum of RM50,000 as exemplary damages to the plaintiffs in each of Suit 317 and 318.

However, we are of the view that there was no basis for the grant of exemplary and aggravated damages. There is no evidence of aggravation suffered by the plaintiffs. Neither do the facts of the case bring it within any one of the accepted categories set out in *Rookes v Barnard* [1964] 1 All ER 367 for the award of exemplary damages, the principles of which in turn have been incorporated into Malaysian law, for example in *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500 and *Taz Logistics Sdn Bhd v Taz Metals Sdn Bhd & Ors* [2019] 3 MLJ 510; [2019] 2 CLJ 48. We find that the award of general damages sufficiently compensates the plaintiffs' loss. Wherefore, we set aside the orders for the award for aggravated damages. Consequently, the appeal was allowed in part and the orders (ii) and (iii) of the order dated 24 September 2018 were set aside.

COSTS

[54] As for costs we awarded the sum of RM50,000 to the plaintiffs/respondents in each appeal subject to allocator as costs here and below. In this regard, order (v) of the order dated 24 September 2018 in respect of costs was also set aside.

Appeal allowed in part with costs of RM50,000 to the plaintiffs.

Reported by Kohila Nesan